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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 627

In the matter of the application of New York County Lawyers Association to punish for contempt and to enjoin the unlawful practice of the law by Lorenzo J. Roel.

LORENZO J. ROEL,

Appellant,

v.

NEW YORK COUNTY LAWYERS ASSOCIATION,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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INDEX

PAGE

I—Appellee's argument that since the statute in question excludes appellant from his occupation because he is not a member of the New York Bar, it does not exclude him from such occupation because he is an alien is without merit ... 1

II—Appellee's argument that foreign lawyers may reasonably be excluded from the occupation of giving advice on foreign law because, in giving such advice, they might be guided by their "foreign allegiance" is also without merit 3

III—Appellee's argument that since the practice of foreign law and the practice of domestic law are both the "practice of law", whatever requirements are reasonable for one are equally reasonable for the other is unsound 5

A. The public is not protected against incorrect advice on foreign law by the requirement that persons giving such advice be members of the New York Bar 6

B. Since protection of the public admittedly does not require that a New York lawyer know foreign law and be able to relate his advice to foreign law, neither does the protection of the public require that a foreign lawyer know New York law and be able to relate his advice to New York law 8

PAGE

IV—Since the New York Court of Appeals expressly decided the federal question that the Statute, as construed by it, does not violate the due process clause and since the order appealed from must be reversed if this Court holds to the contrary, appellee's contention that the decision "rests on an adequate non-federal basis" is erroneous 9

V—Appellant's practice in proceeding by appeal under Title 28 U.S.C. Sec. 1257 (2) is correct .. 10

Conclusion 12

TABLE OF CASES

Asakura v. Seattle, 265 U. S. 332 2

Flournoy v. Wiener, 321 U. S. 253 10

Herb v. Pitcairn, 324 U. S. 117 9

Standard Oil Co. v. Johnson, 316 U. S. 481 11

Takahashi v. Fish & Game Comm., 334 U. S. 410 2

Toomer v. Witsell, 334 U. S. 385 4

STATUTE

Title 28, U.S.C. Sec. 1257 (2) 10

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1

Appellee's argument that since the statute in question excludes appellant from his occupation because he is not a member of the New York Bar, it does not exclude him from such occupation because he is an alien is without merit.

Appellee expressly states (p. 9):

> "In no State of the United States may an alien practice law and the states are uniform in their denial of admission of aliens to the Bar."

Since, then, appellant is excluded from the New York Bar because he is an alien, and is excluded from his occupation because he is not a member of the New York Bar, it necessarily follows that he is excluded from his occupation because he is an alien. Obviously, the law that aliens cannot be excluded from occupations merely because of their alienage cannot be evaded by requiring a license to engage in such occupations and limiting the issuance of such license to citizens. On appellee's theory, a statute requiring a license to engage in the occupation of commercial fishing and limiting such license to American citizens is constitutional since it excludes aliens because they have no license and not because they are aliens. This Court, however expressly held to the contrary in *Takahashi* v. *Fish & Game Comm.*, 334 U. S. 410 (p. 13 of "Jurisdictional Statement").

Similarly, in *Asakura* v. *Seattle*, 265 U. S. 332, this Court struck down a statute requiring that pawnbrokers be licensed but limiting the issuance of such license to American citizens. This Court expressly held that the statute was unconstitutional because "it makes it impossible for aliens to carry on the business" (pp. 341-2). On appellee's theory, this statute, denounced by this Court as unlawfully excluding Japanese from the occupation of pawnbroker, was perfectly proper since it excluded them not because they were Japanese but because they didn't have a license, even though such license could not be obtained by Japanese.

What has been said above applies equally to appellee's contention that appellant is not excluded from his occupation because he does not know New York law but because he is not a member of the New York Bar. Since, obviously, he cannot be a member of the New York Bar without knowing New York law, the requirement that he be a member of the New York Bar as a condition to engaging in his occupation of giving advice on foreign law

excludes him from such occupation because he does not know New York law and is qualified to advise only on Mexican law (fols. 129, 135, 171, 176).

II

Appellee's argument that foreign lawyers may reasonably be excluded from the occupation of giving advice on foreign law because, in giving such advice, they might be guided by their "foreign allegiance" is also without merit.

Appellee does not question the rule of law relied on by appellant that aliens cannot constitutionally be excluded from any occupation unless they are, as a class, "the peculiar source of the evil" at which the statute excluding them is aimed. Appellee attempts to put alien lawyers in such a class by the following argument (pp. 9-10):

> "The foreign lawyer owes his allegiance to a foreign power. If he were permitted to give advice as to foreign law, there is the danger that he would be guided by his foreign allegiance rather than his duty to his New York client."

Not only is there nothing in the Record to support this argument of appellee's but this Court will take judicial notice that the "foreign allegiance" of alien lawyers cannot, in any way, motivate them to give erroneous or dishonest advice to Americans on foreign law. For instance, what conceivable reason is there for saying that appellant, a Mexican citizen and member of the Mexican Bar, is likely to give incorrect advice on Mexican law to his New York clients because he is a Mexican citizen and "owes his allegiance to a foreign power"? What conceivable benefit can Mexico derive from her lawyers' misleading Americans as to what Mexican law is?

It is, we submit, a wholly gratuitous reflection upon foreign nations to say that their lawyers are under a duty, as citizens of their respective foreign countries, to mislead Americans as to what the law of such foreign countries is. Obviously, a Mexican lawyer residing in New York is no more likely to mislead Americans as to to Mexican law because of his "foreign allegiance" than a Mexican lawyer in Mexico. Does appellee contend that an American citizen who consults a Mexican lawyer in Mexico City is in danger of getting incorrect or dishonest advice as to Mexican law because this lawyer "owes his allegiance to a foreign power"? Appellee's argument that the only place in the world where Americans can get sound advice on foreign law is in America and only by consulting American lawyers there, is, we respectfully submit, absurd.

This Court said, in *Toomer* v. *Witsell*, 334 U. S. 385, in holding unconstitutional a South Carolina Statute requiring non-residents to pay a fishing license fee one hundred times as great as residents (pp. 398-9):

> "Nothing in the Record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater. * * * But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion. The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose. * * * *We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced against them.*" (Emphasis supplied)

The application of the above case to the case at bar is clear. Just as, in the cited case, a State could not discriminate against non-citizens where there was no "reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced against them" which, in effect, excluded them from the occupation of fishing in the State, so, in the case at bar, a State cannot exclude alien lawyers from the occupation of giving advice on foreign law where there is no "reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced against them," entirely excluding them from such occupation.

Similarly, as in the cited case, "the State is not without power", in the case at bar, to impose reasonable regulations on alien lawyers, requiring them to be qualified in their foreign law and possess good character, as expressly recommended by appellee's own Committee (pp. 25-6 of appellant's "Jurisdictional Statement"). But, as in the cited case, "we would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced against them", in excluding lawyers from the occupation of giving advice on foreign law because of the danger that they would be guided by their "foreign allegiance" rather than by their duty to their New York clients.

III

Appellee's argument that since the practice of foreign law and the practice of domestic law are both the "practice of law", whatever requirements are reasonable for one are equally reasonable for the other is unsound.

Appellee's whole case really reduces itself to this: Foreign law and domestic law are both "law" and the

practice of foreign law and the practice of domestic law are both the "practice of law". Hence, whatever requirements are reasonable for engaging in one are equally reasonable for engaging in the other. Since it is reasonable to require that persons practicing domestic law be American citizens, have knowledge of domestic law and be members of the State Bar, it is equally reasonable to impose the same requirements on persons practicing foreign law. So the argument of appellee runs. This argument is, we submit, unsound.

The fact that foreign law and domestic law are the same in that both are "law" does not mean that they are the same in all respects or that there are no differences between them which require different treatment for any purpose. For instance, knowledge of domestic law is essential to the practice of domestic law; but is it not absurd to say that knowledge of domestic law is essential to the practice of foreign law merely because both are equally "law" and that what is required for the practice of one must be required for the practice of the other?

Similarly, as to the requirement of American citizenship, such requirement is reasonable for those practicing domestic law (who are officers of the Court) but unnecessary and unreasonable for those practicing foreign law who cannot appear in court and need not be officers thereof. Hence, the mere fact that those who practice foreign law and those who practice domestic law are both "practicing law" is no reason for requiring American citizenship of both, thereby entirely excluding foreign lawyers from giving advice on their own foreign law.

A. The public is not protected against incorrect advice on foreign law by the requirement that persons giving such advice be members of the New York Bar.

Appellee's argument that "the protection of the public when they seek legal advice" requires that advisers on

foreign law be members of the New York Bar overlooks the fact that knowledge of foreign law is not required for membership in the New York Bar and that such members are wholly ignorant of foreign law. How, then, is the public protected by a statute forbidding foreign lawyers who know foreign law to advise the public on such law and permitting only New York lawyers wholly ignorant of foreign law to give advice on such law? Indeed, New York lawyers, although wholly ignorant of foreign law, cannot consult foreign lawyers in New York who know such law since advising lawyers is "practicing law" the same as advising laymen (as the dissenting opinion below points out, 3 N. Y. 2d at p. 235); and the statute in question, construed as forbidding foreign lawyers to advise laymen on foreign law, thus forbids them to advise New York lawyers on foreign law, since it forbids them "to practice law as aforesaid or in any other manner."

Where, then, is the protection to the public in this statute, as construed, which prevents the public from consulting foreign lawyers who know foreign law and forces them to consult New York lawyers who not only know nothing of foreign law but cannot consult those who do?

Obviously, the only way to protect the public against incorrect advice on foreign law is by legislation requiring that persons practicing foreign law be qualified in such foreign law and possess good moral character. Such legislation has been proposed by appellee's own Committee on the Unlawful Practice of Law (quoted in appellant's Jurisdictional Statement, pp. 25-6). The fact that such legislation has not been enacted and that until it has been enacted, the public may be inadequately protected against ignorant or unscrupulous advisers on foreign law does not make it reasonable for the statute in question to entirely exclude foreign lawyers from their occupation by requiring them to be members of the New York Bar which they cannot join because they are aliens.

B. Since protection of the public admittedly does not require that a New York lawyer know foreign law and be able to relate his advice to foreign law, neither does the protection of the public require that a foreign lawyer know New York law and be able to relate his advice to New York law.

Appellee argues that a foreign lawyer who knows no domestic law should not be allowed to advise New York residents on foreign law, since "he is unable to relate his advice to domestic law and thus is unable to consider all the elements of the problem presented to him for advice" (p. 13). This reasoning is obviously unsound since, by precisely the same logic, a New York lawyer who knows no foreign law should not be allowed to advise New York residents on domestic law, since "he is unable to relate his advice to" foreign law and "thus is unable to consider all the elements of the problem presented to him for advice". In other words, appellee's reasoning that foreign lawyers should be put out of business because they do not know New York law would likewise put New York lawyers out of business because they do not know foreign law! Indeed, appellee argues that there are no "areas of foreign law which do not relate to domestic law or to the status of a member of the public in New York" (p. 13). But if, as appellee contends, foreign law and domestic law are so interrelated that no one should advise on the former without knowing the latter, then it follows that no one should advise on the latter without knowing the former. That is to say, no one should be allowed to advise on the law of any state or nation who does not know the laws of all states and nations. Appellee's argument leads to absurd results and must be rejected.

IV

Since the New York Court of Appeals expressly decided the federal question that the Statute, as construed by it, does not violate the due process clause and since the order appealed from must be reversed if this Court holds to the contrary, appellee's contention, that the decision "rests on an adequate non-federal basis" is erroneous.

We submit that appellee wholly misconceives the doctrine that this Court will not review the decision of a State court which rests on an adequate non-federal basis. That doctrine is that where the decision of the State court may be supported on other and independent grounds, regardless of whether its decision of the federal question was right or wrong, this Court will not review the decision. The case at bar is clearly no such case since the decision of the State court, in this case, cannot be supported on any grounds at all if its decision of the constitutional question was wrong. Obviously, if the statute in question is unconstitutional, as construed and applied to appellant, the decision of the New York Court of Appeals holding him in contempt for violating this statute cannot be supported on any ground, federal or non-federal, and therefore does not rest on an adequate non-federal basis. This is clear from considering the reason given by this Court for refusing to review decisions that rest on an independent, non-federal basis. This Court said in *Herb* v. *Pitcairn*, 324 U. S. 117, 125-6:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of State Courts that rest on adequate and independent State grounds. * * * If the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Similarly, this Court said in *Flournoy* v. *Wiener*, 321 U. S. 253, 261-2:

> "Any determination which we might make of the Fifth Amendment question would thus leave unaffected the State Court's judgment brought here for review. * * * In such a case this Court has said that it will not enter 'a useless and profitless reversal where the same judgment will be rendered by the Court below after they have corrected the error in the federal question.'"

It is, then, submitted that the doctrine of the above cases has no application to the case at bar in which "the error in the federal question", if this Court finds such error, requires reversal of the State Court decision.

V

Appellant's practice in proceeding by appeal under Title 28 U.S.C. Sec. 1257 (2) is correct.

The Statute referred to is as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

On this appeal, appellant has "drawn in question the validity of a statute of a state on the ground of its being repugnant to the Constitution." As said by the New York Court of Appeals, in its opinion below, "he [ap-

pellant] urges that * * * if he is subject to Section 270 of the Penal Law, that statute is unconstitutional" and the Court further refers to "appellant's claim that Section 270 of the Penal Law when applied to him deprives him of liberty and property without due process of law." The decision of the New York Court of Appeals was "in favor of the validity" of the Statute, since it held that the appeal should be dismissed "on the ground that no substantial constitutional question is involved" and that "we see no substance in appellant's claim that Section 270 of the Penal Law when applied to him deprives him of liberty and property without due process of law." This appeal thus comes squarely within the Statute above quoted. In *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, a case very similar to the case at bar, this Court held that the proper remedy was an appeal under Sec. 237 (a) of the Judicial Code, containing the same provisions as are now in Tit. 28 U.S.C. Sec. 1257 (2). This Court said (pp. 482-3):

> "The California Motor Vehicle Fuel License Tax Act imposes a license tax, measured by gallonage, on the privilege of distributing any motor vehicle fluid. Section 10 states that the Act is inapplicable to any motor vehicle fuel sold to the Government of the United States or any department thereof for official use of said Government. The appellant, a distributor within the meaning of the Act, sold gasoline to the United States Army Post Exchanges in California. The State levied a tax, and the appellant paid it under protest. The appellant then filed this suit in the Superior Court of Sacramento County seeking to recover the payments upon two grounds: (1) that sales to the Exchange were exempt from tax under Section 10; (2) *that if construed and applied to require payment of the tax on such sales, the Act would impose a burden upon instrumentalities or agencies of the United States contrary to the Fed-*

eral Constitution. Holding against the appellant on both grounds, the trial court rendered judgment for the State. The Supreme Court of California affirmed, 19 Cal. 2nd 104; 119 poc. 2nd 329. *Since validity of the state statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here on appeal under Sec. 237 (a) of the Judicial Code."* [Now Tit. 28 U.S.C.A. Sec. 1257 (2).]

That the appeal, in the case at bar, was properly taken, and falls within the doctrine of the case quoted above is clear from appellee's own statement of the nature of appellant's claim, as follows (p. 19):

> "His claim was that if the Court construed said section to include the practice of foreign law, and applied such construction to him, he would be deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States."

CONCLUSION

Appellee's motion to dismiss this appeal should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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